85-921

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

Term,

CARL E. WIDELL & SONS,
Petitioner

v.

RICHARD AND ANNIE ELLISON
UNDERWOOD MEMORIAL HOSPITAL
TRANSPORTATION INSURANCE COMPANY OF CNA
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals correctly affirmed a District Court's grant of a motion to strike Petitioner's Motion for New Trial based on Fed. R. Civ. P. 60(b)(3) and evidence appended thereto which asserted that the adverse party engaged in fraud, misrepresentation and other misconduct to obtain judgment.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	4
CONCLUSION	7
APPENDIX	1a
Judgment Order of Court of Appeals (Walter H. Stapleton, J.)	1a
Order Denying Petition for Rehearing of Court of Appeals (Walter H. Stapleton, J.)	3a
Memorandum and Order sur Motion for New Trial (Ditter, J.)	5a
Memorandum and Order sur Motion to Strike (Ditter, J.)	14a

TABLE OF AUTHORITIES

Cases:

Bankers Mortgage Co. v. United States, 423 F.2d 73 (4th Cir. 1970)	6
Central Operating Co. v. Utility Workers, 419 F.2d 245 (4th Cir. 1974)	5
Ervin v. Wilkinson, 701 F.2d 59 (7th Cir. 1983)	5
Great Coastal Express v. International Broth., Etc., 639 F.2d 780 (4th Cir. 1980)	5
Klapprott v. United States, 335 U.S. 601 (1949)	5
McKinney v. Boyle, 404 F.2d 632 (9th Cir. 1968)	5
Rosebud Sioux Tribe v. A & P Steel, Inc., 733 F.2d 509 (8th Cir. 1984)	6

Page

Rosier v. Ford Motor Co., 573 F.2d 1332 (5th Cir. 1978) 6

Stridiron v. Stridiron, 698 F.2d 204 (3rd Cir. 1981) 6

Werner v. Carbo, 731 F.2d 404 (4th Cir. 1984) ... 5

Statutes and Rules:

28 U.S.C. §1254 1

28 U.S.C. §1332 2

Federal Rule of Civil Procedure 60 ..... 1, 4, 5, 6, 7

Eastern District of Pennsylvania Rule of Civil Procedure 21 3

OPINIONS BELOW

No Opinions of the courts below have been published. The Court of Appeals for the Third Circuit issued a summary Judgment Order. 1a The Order of the Court of Appeals *Sur Petition for Rehearing* appears at 3a. The Memorandum and Order of the District Court regarding Petitioner's post-trial motions appears at 5a. The District Court's Memorandum and Order striking Petitioner's fraud on the court argument and supporting evidence appears at 14(a).

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals for the Third Circuit bears the date of August 13, 1985. It was entered on that day. Rehearing was requested by Petitioner. Petitioner's request for rehearing was denied by an Order dated September 30, 1985. Petitioner believes 28 U.S.C. §1254(1) confers on the United States Supreme Court jurisdiction to review the judgment in question by Writ of Certiorari.

STATUTORY PROVISIONS INVOLVED

Rule 60(b) of the Federal Rules of Civil Procedure provides, in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> * * *
>
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.
>
> * * *

or (6) any other reason justifying relief from the operation of the judgment . . . .

STATEMENT OF THE CASE

Federal jurisdiction in this matter was premised on an amount in controversy in excess of ten thousand dollars ($10,000.) and diversity of citizenship. Cf. 28 U.S.C. §1332.

The case was brought by Richard and Annie Ellison against Carl E. Widell & Son (Widell)[1] for damages as a result of personal injuries sustained by Richard Ellison on September 30, 1981. Richard Ellison alleged he was at Widell's business premises for the purpose of obtaining a load of scrap metal. While at the Widell facility, a crane operated by a Widell employee, John Dickinson, was used to place scrap metal into the tractor-trailer driven by Richard Ellison. During the course of the loading process, the block and hook of the crane came into contact with Ellison's hand.

During the course of pretrial discovery, an employee of Widell named Edward Toal was deposed on November 22, 1982. At the deposition Mr. Toal testified that he knew very little about the accident involving Ellison. Toal further testified that besides the fact he was advised of the happening of the accident and that Ellison was injured, he had no other knowledge of the circumstances surrounding the accident. Mr. Toal specifically denied having talked to crane operator John Dickinson about the accident.

At the time of Edward Toal's deposition, he was an officer of the Widell corporation.

An attempt was made to schedule the deposition of crane operator Dickinson. In response to a subpoena, Mr. Dickinson's physician advised the court and counsel that the crane operator suffered from a form of mental

1. The corporaion Carl E. Widell & Son has no parent companies, subsidiaries or affiliates.

illness and that compelled attendance at a deposition or trial could exacerbate his illness. In response to this advice, counsel stipulated that Dickinson would be deemed to be an unavailable witness for the course of the proceedings.

Shortly after the accident, John Dickinson did give a hand written statement regarding the happening of the September 30, 1981, accident. As a result of the abovementioned stipulation, counsel for Widell made no attempt to move the crane operator's prior statement into evidence at trial.

The trial of this case ran from Tuesday, May 24, 1983, to Thursday, June 2, 1983.

Edward Toal was called as a witness for the plaintiff at trial.[2] During the course of his testimony, he stated that John Dickinson had admitted responsibility for the happening of the accident. Mr. Toal's testimony was in direct contradiction to his deposition testimony and the statement of John Dickinson.

Shortly before the trial, Edward Toal had been dismissed from his position with the Widell corporation.

A jury verdict was returned in favor of Richard and Annie Ellison.

Thereafter, the Widell corporation moved, *inter alia*, for a new trial on the theory that a fraud on the court had been perpetrated by the plaintiffs, their witnesses and their attorney. In support of its "fraud on the court" argument, Widell appended the statement of John Dickinson to its brief. The contents of the statement was heavily referred to in the body of the brief.

In response to Widell's "fraud on the court" argument, the Ellisons moved to strike the argument and expunge the Dickinson statement from the record. The

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2. It is significant to note that the Ellisons had listed only the deposition of Edward Toal in their pre-trial memorandum. Over Petitioner's objection, and in violation of E.D.Pa. R.C.P. 21(d)(1), Toal was permitted to testify in person and to facts which contradicted his deposition testimony.

District Court judge granted Ellisons' motion and fined defense counsel one hundred dollars ($100).

The Third Circuit Court of Appeals affirmed the trial court's failure to consider Widell's "fraud on the court" argument without opinion.

REASONS FOR GRANTING THE PETITION

The Petition of Carl E. Widell & Sons, Inc., should be granted because it presents a case where this Court should exercise its supervisory powers. The Court of Appeals for the Third Circuit and the District Court have sanctioned a departure from the accepted and usual course of judicial proceedings by not considering Petitioner's motion for relief from judgment premised on Fed. R. Civ. P. 60(b)(3) (Rule 60(b)(3)).

Relief from judgments obtained by fraud, misrepresentation, or other misconduct of an adverse party is clearly permissible under Rule 60(b)(3). Despite the fact that such issues may be reviewed by the trial judge, in the present case the trial court refused to consider Petitioner's motion or its evidence in support of its motion.

Petitioner's Rule 60(b)(3) motion and evidence appended thereto presented significant grounds upon which the trial court could base its review. The motion identified how the plaintiffs, their witnesses and/or their counsel distorted the truth regarding Richard Ellison's injury and the cause of his injury.

Petitioner contends the District Court abused its discretion by striking its Rule 60(b)(3) motion. Petitioner further contends that the trial court should have considered the Rule 60(b)(3) motion so that a determination of its merits could be made.

It is recognized by the Petitioner that the disposition of motions under Rule 60(b) ordinarily is a matter within

the discretion of the district court which will not be disturbed on appeal absent a showing of abuse of that discretion. *Werner v. Carbo*, 731 F.2d 204, 206 (4th Cir. 1984); *Central Operating Co. v. Utility Workers*, 491 F.2d 245, 252 (4th Cir. 1974). Nevertheless, Petitioner's claimed that the fraud, misconduct or misrepresentation of the adverse party prevented it from presenting the merits of its defense. For this reason, the trial court abused its discretion by not liberally construing the Rule 60(b) motion. *Cf. Ervin v. Wilkinson*, 701 F.2d 59, 61 (7th Cir. 1983).

At no time were Petitioner's allegations in support of its claim that the judgment was obtained by fraud, misconduct or misrepresentation denied by any party to this suit. Therefore, for purposes of review, such allegations should have been assumed to be true by the District Court and the Court of Appeals. *Cf. McKinney v. Boyle*, 404 F.2d 632, 634 & n.2 (9th Cir. 1968), cert. denied, 394 U.S. 992, 89 S. Ct. 1481, 22 L.Ed.2d 1481 (1969); *Klapprott v. United States*, 335 U.S. 601, 604, 69 S. Ct. 384, 385, 93 L.Ed. 266 (1949). Therefore, it is Petitioner's contention that the District Court should have granted Petitioner the opportunity to establish its claim at a hearing under Rule 60(b) for relief from judgment under subsection (3) or subsection (6). *Cf. Ervin v. Wilkinson, supra*. The District Court should have also supplemented the record with specific findings of fact relevant to Petitioner's rule 60(b)(3) motion. *Cf. Great Coastal Exp. v. International Broth., Etc.*, 639 F.2d 780 (4th Cir. 1980).

While the specific issue raised by the herein Petition relates to what procedure should be employed when a motion under Rule 60(b)(3) is made, the issue can not be addressed without consideration of the integrity of the trial process. The uncontradicted allegations of Petitioner's rule 60(b) motion established that the plaintiffs, their witnesses and their attorney took advantage of

the "unavailability" of a material witness. Such advantage included revision of testimony which directly related to the issue of liability and which was in direct contradiction to deposition testimony previously given in this case.

Rule 60(b) was intended to preserve the delicate balance between the sanctity of final judgments and the necessity that justice be done in light of all the facts. *Bankers Mortgage Co. v. United States*, 423 F.2d 73, 77 (4th Cir.), *cert. denied*, 399 U.S. 927, 90 S. Ct. 2242, 26 L.Ed.2d 793 (1970). The Rule was further intended to prevent a judgment from becoming a vehicle of injustice and a motion under the Rule was intended to be construed liberally to do substantial justice. *Cf. Rosebud Sioux Tribe v. A. & P. Steel, Inc.*, 773 F.2d 509 (8th Cir. 1984).

The District Court and the Court of Appeals failed to consider the principles which serve as the foundation of Rule 60(b)(3). Further, the courts below failed to allow Petitioner the opportunity to establish that the plaintiffs, their witnesses and their attorney engaged in fraud or other misconduct which prevented Petitioner from fully and fairly presenting his case. *See, Stridiron v. Stridiron*, 698 F.2d 204, 207 (3rd Cir. 1983); *Rosier v. Ford Motor Co.*, 573 F.2d 1332, 1339 (5th Cir. 1978). Rather the courts below refused to consider Petitioner's motion without reason or just cause.

CONCLUSION

Since Rule 60(b)(3) provides a remedy for judgments obtained through fraud, misrepresentation and other misconduct, the courts below should have considered Petitioner's motion. In light of the summary disposition of Petitioner's Rule 60(b)(3) motion by the courts below, this Court's supervisory power should be invoked to direct a hearing on the motion and to direct the District Court to specifically address Petitioner's claim in light of the evidence which supports the claim.

Submitted by

Frank X. O'Brien
John J. O'Brien, Jr.
Attorneys for Petitioner,
Carl E. Widell & Sons

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-1003

ELLISON, Richard
ELLISON, Annie

vs.

CARL E. WIDELL & SON (INC.)

vs.

UNDERWOOD MEMORIAL HOSPITAL and
TRANSPORTATION INSURANCE
COMPANY OF CNA

Carl E. Widell & Son, Inc.

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(Civil No. 82-0297 — E.D.Pa.)

District Judge: Honorable J. William Ditter, Jr.

Submitted Under Third Circuit Rule 12(6)
August 6, 1985

Before: ALDISERT, *Chief Judge*, and STAPLETON and MANSMANN, *Circuit Judges*

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By the Court,

WALTER STAPLETON

Circuit Judge

ATTEST:

SALLY MRVOS

Sally Mrvos, Clerk

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-1003

ELLISON, Richard
ELLISON, Annie

vs.

CARL E. WIDELL & SON (INC.)

vs.

UNDERWOOD MEMORIAL HOSPITAL and
TRANSPORTATION INSURANCE
COMPANY OF CNA

Carl E. Widell & Sons, Inc.,

Appellant

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, and MANSMANN, *Circuit Judges*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

WALTER K. STAPLETON

Circuit Judge

Dated: September 30, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD ELLISON and ANNIE ELLISON	:	CIVIL ACTION
	:	No. 82-0297
v.	:	
	:	
CARL E. WIDELL & SONS, INC.	:	
	:	
and	:	
	:	
UNDERWOOD MEMORIAL HOSPITAL	:	

MEMORANDUM AND ORDER

DITTER, J. December 17, 1984

Plaintiff Richard Ellison was employed as a truck driver for a metal salvage company and went to the yard of defendant, Carl E. Widell and Son, Inc., to pick up scrap. During its loading, plaintiff was injured when his hand was pinned between the truck side and the hook of a crane operated by defendant's employee. A jury concluded the crane operator was negligent and awarded plaintiff damages. Defendant's post trial motions are now before me.

Defendant first contends a new trial is warranted because on two occasions the topic of insurance was improperly brought to the attention of the jury. Significantly, in both instances, I offered to give a cautionary instruction, a suggestion which defense counsel refused. This is not to say, however, there was any prejudice from either event.

Turning to defendant's first contention, I note initially that it is directed to an incident when the actual word, "insurance," was never used. This is what occurred: In recounting who was present at an onsite examination of the crane, a witness noted that "John

O'Brien, attorney for General Accident" was there. N.T. 3-136. There was no suggestion that General Accident was an insurance company, much less that it was defendant's liability carrier. To justify granting a new trial I would have to connect three unwarranted assumptions: first, the jury knew the words, General Accident, referred to *an* insurance company; second, the jury concluded this particular insurance company, General Accident, provided liability coverage to defendant, and third, this knowledge in some unexplored way prejudiced the defendant. I am unable to make these leviathan leaps of illogic.

The second occasion was equally harmless. A witness identified a letter as coming from the Westmoreland Casualty Company, Westmoreland provided workman's compensation coverage to plaintiff's employer and had no connection with the case at bar. Again, defense counsel refused my offer to explain this to the jury. N.T. 5-9 to 10. Also, it should be noted that this testimony came in by way of videotape deposition to which no prior objection had been made. Again, there was no prejudice of the magnitude required to obtain a new trial, and even if there was prejudice, it came from counsel's refusal of a cautionary instruction. No new trial is warranted.

Defendant next contends it was error to permit Edwin Toal, a witness not listed in plaintiff's pre-trial order, to testify. However, it is clear the ruling was correct when measured by the standards announced in *Meyers v. Pennypack Woods Home Ownership Association*, 559 F.2d 894, 904 (3rd Cir. 1977). Toal was a known witness. Both parties were aware of his knowledge of pertinent facts and he was listed as a trial witness in defendant's pre-trial order. N.T. 6-24. Toal's testimony contained no surprises. He had informed both his employer and defense counsel that the crane operatior, John Dickerson, admitted he had been negligent. N.T. 3-90.

The defendant also contends Dickerson's statement to Toal, should have been excluded as hearsay. However,

what Dickerson said was not hearsay but rather an admission by a party-opponent. *See* Federal Rule of Evidence 801(d)(2)(D).[1] Furthermore, because Dickerson was admittedly not available to testify, *see* N.T. 5-37, the statement, if hearsay, was admissible as a declaration against interest and thus as an exception to the hearsay rule. Federal Rule of Evidence 804(b)(3).

Next, defense counsel assigns error to my refusal to let him cross examine Toal about a conversation Toal had with Steven Beckett, who had taken plaintiff to the hospital after the accident. This was a classic case of double hearsay and while it may have been admissible as an admission against interest, if introduced through Beckett, it was Toal and not Beckett who was on the witness stand.

Defense counsel further argues that the fact that the conversation took place, quite apart from its content, had evidentiary value to impeach Beckett. He bases this contention on the following portion of Beckett's direct examination:

> BY MR. PLAUM:
>
> Q. During the 5-minute ride did he have any conversation with you?
>
> MR. O'BRIEN: Objection, sir.

---

1. "In most common law jurisdictions, a statement by an agent or servant can only be used against the principal if the agent or servant is employed for the purpose of making such statement. There is a trend, however, to admit statements relating to a matter within the scope of the agency of employment. Federal Rule 801(d)(2)(D) follows this trend and departs from the common law. A typical case is one where a driver of a truck owned by someone other than the driver (e.g., an employer) allegedly runs a red light. An accident occurs, and the driver apologizes to the other party involved in the accident and comments that he is sorry that he ran the red light. . . . The new Rule would permit the statement to be used against the employer-owner as well as against the driver." S. Saltzburg and K. Redden, *Federal Rules of Evidence Manual* (3d Ed., 1982) 502.

THE COURT: Sustained.

BY MR. PLAUM:

Q. Did Mr. Ellison talk to you?

MR. O'BRIEN: Objection, sir.

THE COURT: Sustained.

BY MR. PLAUM:

Q. What, if anything, did Mr. Ellison say to you?

MR. O'BRIEN: Objection, sir.

THE COURT: You have already asked him that, I think.

MR. PLAUM: No, I didn't ask him during the 5-minute ride to the —

THE COURT: I thought you did. I will let you ask him one more time.

BY MR. PLAUM:

Q. All right. What, if anything, did Mr. Ellison say to you during that ride to the hospital?

A. *There was no conversation.* He was just — "I will get you there," that's what I told him, and that was the main thing, to get him to the hospital. (emphasis added) N.T. 2-14.

On cross examination, Beckett was not asked about any conversation which he had had with plaintiff.

When defense counsel sought to elicit from Toal what Beckett had said about a conversation with plaintiff, this is what occurred:

BY MR. O'BRIEN:

Q. Did Steven Beckett tell you he took Mr. Ellison to the hospital?

MR. PLAUM: Objection.

THE COURT: Yes, sustained.

BY MR. O'BRIEN:

Q. Did he tell you he had a conversation with Mr. Ellison on the way to the hospital?

MR. PLAUM: Objection.

THE COURT: Sustained.

BY MR. O'BRIEN:

Q. Mr. Toal, did you relate to me the substance of a conversation that you had with Steven Beckett about Mr. Ellison's accident?

MR. PLAUM: Objection.

THE COURT: Sustained.

MR. O'BRIEN: I'm just asking him whether he related it to me or not. That is not objectionable.

THE COURT: Well, — all right, I will let you answer that.

A. Yes, I did.

Q. Would you tell us what you related to me in that respect, sir?

MR. PLAUM: Objection.

THE COURT: Sustained.

MR. O'BRIEN: No further questions. N.T. 3-98 to 99.

There was no way for me to know that counsel was seeking to impeach Beckett. Federal Rule of Evidence 103(2) requires an offer of proof under such circumstances. Whatever dubious value there might have been to whatever response Toal might have made, its exclusion under the circumstances was not error.

Defendant next contends that my refusal to instruct the jury on the "master-servant/borrowed employee" doctrine was error. The evidence showed that defendant's employee, Dickerson, was operating the crane from a position in its cab. He was unable to see into the body of the truck which he was loading. Therefore, plaintiff gave hand signals to tell Dickerson whether a load should be moved to the left, right, forward, or back. Counsel contends that this made Dickerson a borrowed servant of plaintiff's employer, and thus plaintiff's fellow servant. From this argument, defendant proceeds to the assertion that plaintiff has no right to recover from defendant because he was injured by a fellow servant and thus is relegated to his rights under the workman's compensation laws.

Counsel confuses the giving of hand signals with the exercise of a right to control. Plaintiff's employer was S. D. Richman and Sons. It is elementary that Dickerson could only have become the servant of Richman if Richman had agreed to the arrangement and if the defendant had also done so. There was no arrangement, no agreement. Even if there had been an agreement, an analysis of the facts show plaintiff did not exercise any control over Dickerson. He did not tell Dickerson where to place the crane, which lever to engage for what purpose, how much power to use, the angle at which the boom was to be placed, how high a given load should be raised, the speed at which it should be lowered, or anything else about how Dickerson was to do his job. Plaintiff merely gave hand signals. Plaintiff did not tell Dickerson when to start work or when to stop. He did not provide the crane or maintain the crane. He did not train Dickerson, test Dickerson, or pay Dickerson. He made no requests of defendant about Dickerson. His contacts with Dickerson were momentary and fragmentary. The work Dickerson was doing was for defendant's benefit, not plaintiff's. The hand signals were given to help

Dickerson, not plaintiff. Neither Dickerson nor the plaintiff had any thought that they were creating the relationship of servant and master between Dickerson and Richman. *See Kelly v. Southern Pacific Company*, 419 US. 318, 324, 95 S. Ct. 472, 476 (1974), citing with approval Restatement (Second) of Agency §227 which in turn refers to §220(2).

Defendant's assertion of the borrowed servant doctrine is factually ludicrous and legally late. It was not raised in the answer or in the pre-trial order. It was not until defendant moved for a directed verdict that this question was brought up. It is also noteworthy that defendant offered no evidence to support this theory. In short, the borrowed servant doctrine is a non-issue in this matter.

Defendant next argues this court lacked jurisdiction over it. First, I note defendant was registered to do business in Pennsylvania, and as such, could be sued here. N.T. 5-38. 42 Pa. C.S.A. §5301(a)(2)(i). Secondly, defendant, in answering both deposition questions and interrogatories, admitted it did business within the Commonwealth of Pennsylvania. N.T. 5-42 & 5-46 to 47. Jurisdiction was properly exercised.

Finally, defendant asserts it was error to grant the motion of the third party defendant, Underwood Memorial Hospital, for a directed verdict. Relying on what it views as "contradictory testimony" between two doctors, defendant states the claim against the hospital should have been submitted to the jury based upon the evidentiary rule of *res ipsa loquitur*. *See Jones v. Harrisburg Polyclinic Hospital*, 437 A.2d 1134 (Pa. 1981). Even if the doctors' testimony could be characterized as contradictory, a view I do not share, defendant presented no expert evidence to support its claim against Underwood. while I agree that expert testimony is not a *per se* requirement in medical malpractice cases, it is a requirement "when there is no fund of common knowledge from which laymen can reasonably draw the inference or

conclusion of negligence." *Jones*, 437 A.2d at 1138. Contradictory testimony in and of itself does not lead to the conclusion that someone was negligent. Here, there was no fund of common knowledge about the proper treatment of hand injuries.

Defendant's theory of liability against Underwood was that the failure to diagnose plaintiff's injury properly, permitted gangrene to develop and made amputation of his finger necessary. The only medical testimony presented, however, was to the contrary. For example, Dr. Beller, a board certified orthopedic surgeon, testified that "the accident of 9/30/81 was the only cause of his [plaintiff's] injuries. N.T. 2-145 & 2-180 to 89. Dr. Beller continued stating the treatment received by the plaintiff at Underwood "was proper," N.T. 2-153, and he would have done "exactly what was done here." N.T. 2-168. Dr. Osterman, an expert hand surgeon, testified to the same effect. Osterman Deposition at 79 to 80; 90 to 91; 127 to 130. In short, the medical testimony was that amputation often times occurs from "crush" injuries such as the one suffered by plaintiff, regardless of the course of medical treatment undertaken. Furthermore, based upon all the evidence, I concluded the only inference the jury could draw was that Underwood's treatment did not cause or aggravate plaintiff's injury. It would have been reversible error for me not to have granted Underwood's motion for a directed verdict. *See Jones*, 437 A.2d at 1137.

For all the above reasons, defendant's motions must be denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD ELLISON and ANNIE ELLISON	:	CIVIL ACTION No. 82-0297
v.	:	
CARL E. WIDELL & SON, INC.	:	
UNDERWOOD MEMORIAL HOSPITAL	:	
TRANSPORTATION INSURANCE COMPANY OF CNA	:	

ORDER

AND NOW, this 17th day of December, 1984, for the reasons expressed in the attached memorandum, defendant, Carl E. Widell & Son, Inc.'s motion for judgment notwithstanding the verdict, or in the alternative for a new trial is denied.

BY THE COURT:

J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD ELLISON and ANNIE ELLISON	:	CIVIL ACTION No. 82-0297
v.	:	
CARL E. WIDELL & SON, INC. and UNDERWOOD MEMORIAL HOSPITAL	:	

MERMORANDUM AND ORDER

DITTER, J. June 25, 1984

In this personal injury case, John Dickerson, a crane operator employed by defendant, was found to have been negligent. Defendant moved for judgment notwithstanding the verdict alleging it was obtained by the fraud of plaintiffs and perhaps that of their counsel. In support of its allegations, defendant submitted an unsworn statement given by Dickinson. This statement differed from the facts attested to by two trial witnesses. The differences, however, were never presented to the jury because, in accordance with the terms of an agreement between counsel, Dickinson did not testify in the original proceedings. Plaintiff now moves to strike Dickinson's statement and to impose costs on defendant's counsel. This motion must be granted.

Although John Dickinson's statement shows his recollection of the events surrounding the accident differed from those of other witnesses, there is no proof as to which is correct. The differences between them are hardly irreconcilable. It is for a jury to weigh contradictory testimony. Absent such testimony being newly discovered, it is not properly presented for the first time in a post-trial motion and in no event, by a self-serving,

unsworn statement of a witness who has not been cross-examined. While a different conclusion might be warranted if some newly discovered evidence suggested the possiblity of perjury on the part of trial witnesses, not even a scintilla of evidence has been advanced on this score. Defendant has merely shown that three people may have different recollections of the same event.

I find unpersuasive defendant's purported justification grounded in its being unable to present Dickinson's version of the facts at trial. Defense counsel stipulated not to call Dickinson. If the stipulation barred introduction of evidence favorable to his case, he can neither complain nor introduce the statement now. I also find unpersuasive defense counsel's purported justification grounded in his duty under Disciplinary Rule 7-102(B)(2). Simply put, that rule requires disclosure of fraud to the court, but in this case there is no evidence of fraud.

In short, defendant now seeks a second bite at the proverbial apple through an unsworn fact witness not offered at trial. Because this is not a newly discovered witness, there can be no justification for attempting to introduce his statement at this late date. To sanction such conduct would be to encourage an attorney to put aside a bit of evidence for the rainy day of an adverse verdict with the expectation of then using it as grounds for a new trial.

The absence of justification for defense counsel's scandalous allegations of fraud and his improper attempt to introduce a fact witness not presented at trial, especially when viewed together with defense counsel's experience and ability, shows bad faith. Counsel's conduct can only be characterized as vexatious and intended to multiply these proceedings unreasonably. As a sanction for this conduct, counsel for the defendant will be required to pay counsel for the plaintiff the sum of $100., in partial reimbursement of counsel fees unnecessarily incurred in connection with this motion.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD ELLISON and	:	CIVIL ACTION
ANNIE ELLISON	:	No. 82-0297
	:	
v.	:	
	:	
CARL E. WIDELL & SON, INC.	:	
and	:	
UNDERWOOD MEMORIAL HOSPITAL	:	

ORDER

AND NOW, this 25th day of June, 1984, it is hereby ordered that:

1. Plaintiffs' motion to strike is granted.
2. Defendant's counsel shall, within ten days, pay to counsel for plaintiffs the sum of $100.

BY THE COURT:

_____

J.